FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 480

ROBERT MORALES, ET AL,
Petitioners

vs.

CITY OF GALVESTON, ET AL,
Respondents

RESPONDENT CITY OF GALVESTON'S BRIEF ON THE MERITS

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PRELIMINARY STATEMENT

This suit was originally brought both against this Respondent City of Galveston (hereinafter referred to as the City) as owner and operator of a grain ele-

vator on a charge of actual negligence and against the shipowner and operator, Cardigan Shipping Company, Ltd., on charges of unseaworthiness and, in addition, actual negligence. As to us—the City of Galveston—the Trial Court found, as a matter of fact, that we were not negligent (181 F. Supp. 191). The Court of Appeals for the Fifth Circuit affirmed for us on the same grounds (272 F. (2d) 191).

On Petition for Certiorari, this Court remanded the case to the Court of Appeals in a memorandum opinion stating:

> "* * * The judgment of the Court of Appeals is vacated and the case is remanded to that court for consideration in light of Mitchel v. Trawler Racer, Inc., 362 U. S. 539." (364 U. S. 295)

Mitchel vs. Trawler Racer, Inc. related solely to the question of unseaworthiness, a matter with which we are not involved. The case then went back to the Court of Appeals and was re-argued solely on the doctrine of unseaworthiness. The additional argument made in the Court of Appeals did not relate to us at all (291 F. (2d) 97). The case then came back to this Court with Petitioners' present application again disclosing that we were not substantially involved. In fact, the three "reasons relied upon for the allowance of the writ" dealt solely with the charge of unseaworthiness. The City is not involved on this point. The City owned and operated the grain elevator; it had nothing to do with the ownership and operation of the ship.

We have now been furnished with Petitioners' Brief on the Merits and from the City's point of view, find it somewhat difficult to organize a brief answer. Under the item of "Questions presented for review", the first six questions deal with the doctrine of unseaworthiness with which we are not concerned. The seventh question is based upon alleged prior incidents which were found by the Trial Court not to be the same as those presented here and could be briefly answered. This same question is carried forward as Petitioners' Proposition No. 4 (Petitioners' Brief Pg. 25). However, most of Petitioners' argument under this proposition (insofar as directed against us) apparently is an effort in a fragmentary manner to raise numerous alleged fact questions which have been determined in our favor. Petitioners have made no effort to review all of the testimony but have referred only to isolated passages. Perhaps the explanation for this type of argument is that with the exception of the first page under Proposition No. 4, Petitioners are merely requoting arguments previously made on fact questions.

The only other point possibly directed against us is Petitioners' Proposition No. 5 (Petitioners' Brief Pg. 34) to the effect that the damages found by the Trial Court were inadequate.

In answer to the small portion of Petitioners' Brief directed against us, we reply with two Counter Propositions—the first, that the Trial Court properly found that we were not negligent and the second, that the Trial Court's findings of damages were correct.

FIRST COUNTER PROPOSITION

The Trial Court and the Court of Appeals properly held that the Respondent City of Galveston was not negligent.

STATEMENT AND ARGUMENT

In order to demonstrate the correctness of the Trial Court's fact findings, affirmed by the Court of Appeals, and, in addition, to demonstrate that the findings of fact, under **McAllister vs. United States,** 348 U. S. 19 (1954), were not clearly erroneous, we must substantially review the evidence.

Elevator B, owned and operated by the City, is an export elevator. It receives grain by rail shipment from inland points for the purpose of temporary storage and subsequent shipment overseas (R. 577). The general method of operation is for an exporter to ask the City for room to accumulate a specified amount of grain that he expects to ship abroad. The grain will originate inland and travel to Galveston by rail arriving in the line haul railroad carriers yard near the elevator. On arrival of a car, the Galveston Cotton Exchange and Board of Trade grain department samplers go to the line haul railroad yards, break the seal on the car, open it and take samples from each car. The sample is then brought to that organization's laboratory (R. 596). After the grain has been graded, the Wharves' car clerk notifies the line haul railroad to give the elevator the car. The City, using its own equipment, spots the car on City tracks adjacent to the elevator (R. 598). The car is then pulled

over the unloading pit. Two City employees using power shovels go into the car and unload the grain, the grain falling by gravity into the unloading pit underneath the car (R. 600-601). As the car is unloaded, an elevating leg, i. e., a rubber conveying belt with approximately 1,000 small buckets on it, takes the grain out of the unloading pit (R. 604) and raises the grain vertically to the top of the elevator where it is weighed. After being weighed, the grain is then released through the bottom of the scale into chutes (R. 606), travels through the chutes down through two distribution floors by gravity (R. 608) and is delivered onto rubber conveyor belts which travel the entire distance of the storage section and which carries the grain until it reaches the point of discharge into a storage bin (R. 609).

When the owner of grain desires to export, such owner will instruct the elevator to load a specified number of bushels of a certain grade (R. 615). Information is given as to the name of the vessel to which the grain is to be delivered. Prior to arrival of the vessel, the elevator foreman will prepare a line-up which is a listing of a number of storage bins from which grain is to be taken to make delivery of the desired grade (R. 616). The mixture is usually made of various grades which when taken together in proper proportion will come out as the grade desired (R. 616-617). A correct mixture results from taking grain from several bins as listed on the line-up—i. e., so much of one grade and so much of another, with the amount from each bin determined by the size of the opening (notches) at the bottom of the bin where the grain

leaves the bin and goes onto the conveyor belt. The grain thus taken out of the bottom of the several storage bins as listed on the line-up, will by use of an open conveyor belt be transferred from these various bins until it comes to a common point at the bottom of the elevating leg (R. 619). The grain then goes on a joint belt up to the scale (R. 620). It then falls into the scale and is weighed and, through spouting and chuting, it goes onto a belt which delivers it from the workhouse to the wharf (R. 620). After reaching the wharf, it goes into a shipping bin, which is above the shipping gallery and immediately above the ship to be loaded (R. 620). The stevedore at this time will have the dock's spout in position. The stevedore then telephones to the elevator, telling them to start releasing the grain (R. 621). An interesting description of this whole operation may be found in the testimony of Elevator Superintendent D. L. Carroll (R. 593-623).

On the question of chemical agents on the grain, on isolated occasions, fumigants are used to stop weevil infestation. It is possible for the grain to have been fumigated at an inland elevator before arriving in Galveston (R. 676). If the grain is ever found to be weevilly in the railroad cars before unloading, it will be fumigated (R. 624) and, on occasion, when grain in the elevator becomes weevilly, it will be fumigated in the storage bins (R. 624). The purpose of the fumigation is to kill the weevils.

With this brief description of the elevator operations in mind, we again revert to Petitioners' position

here. Petitioners primary position as contained in their Second Amended Libel was that the City negligently fumigated the grain (Libellants' Second Amended Libel, Tr. 30). The Trial Court found, as a matter of fact, that the City did not fumigate the grain (Findings of Fact No. 12, Tr. 87-88). Additionally, the Petitioners apparently contended that if the City did not fumigate the grain, it was still liable for having failed to detect the presence of possible fumigants on the grain when it arrived from inland points. The Trial Court found that the City did not know, and in the exercise of reasonable care, could not have known, that the grain had been improperly fumigated at an inland point (Findings of Fact No. 15, Tr. 88). Unless these and other findings of the Trial Court (affirmed by the Court of Appeals), are clearly erroneous, this cause must be affirmed as to the City.

THE TRIAL COURT PROPERLY FOUND THAT THE CITY DID NOT FUMIGATE THE GRAIN WHILE IN ITS POSSESSION.

Actually, we are not sure whether Petitioners attack this finding (Finding No. 12) but out of an abundance of precaution, will demonstrate its correctness. The only two places where the City can fumigate the grain is when it is in railroad cars prior to unloading or is stored in the elevator bins.

THE TRIAL COURT CORRECTLY FOUND THAT THE GRAIN WAS NOT FUMIGATED IN THE RAILROAD YARDS.

The Trial Court found that when grain is received and while it remains in the railroad yards, the City fumigates grain when inspection indicates that fumigation is necessary; that high-life is used as a fumigant; that high-life is poured at various places over the top of the grain; that the cars which are so treated are segregated and after a matter of several days, the grain is placed in the elevators; and that a careful record is kept of the cars so treated and of the grain withdrawn from such cars (Finding No. 12, Tr. 87). These findings are sustained by the undisputed evidence. When a railroad car arrives in a line haul carrier's yard, a pan ticket (railroad car record ticket —Exhibits C and D) is prepared. Galveston Cotton Exchange & Board of Trade samplers open the car and take samples (R. 596). These samples are taken to the Galveston Cotton Exchange & Board of Trade laboratories where the required grading tests are performed under the United States Department of Agricultural standards (R. 596). After the cars are inspected, the pan ticket, in the absence of anything unusual, is passed to the elevator and rests with the elevator's car clerk until the order for unloading comes up (R. 598). As the cars are spotted, the pan ticket moves from the elevator office to the car clerk, who goes to the track prior to pulling the car under the shed, where the car is checked by an elevator employee for any abnormalities and this employee in turn forwards the pan ticket to the bin room man who again goes to the car and checks the car to see if everything is correct; after doing this, the bin room man places the pan ticket into the cardex system and then for-

wards it to the scale floor. After the ticket arrives there, the weigher takes the ticket and the weight is stamped on it (R. 599). The pan ticket then goes to the bin room so that the bin room man may record the weight on the particular bin in which the grain was placed (R. 600). The pan tickets remain a permanent record of the elevator (R. 603).

If when the Galveston Cotton Exchange & Board of Trade inspectors and samplers on the first inspection while the railroad car is in the yard, determine that the grain is weevilly, this fact is set out on the pan ticket and before the car is unloaded the city employees, using high-life, go to the car, open it and pour four gallons of high-life in the car. After the car is fumigated and sits 24 hours, the city calls for a reinspection (R. 626). The Cotton Exchange inspectors after 48 to 72 hours after fumigation reinspect the car (R. 805) and issue a clear certificate at which time the car is then ordered for unloading. During the period of time involved in this suit, high-life was the only fumigant used in this operation. On the pan ticket of each car treated prior to being unloaded, a notation to that effect will appear (R. 626). A list of all cars so treated during any time possibly material to this suit was introduced (City Exhibit E and R. 627, 631, 936). Taking the cars so treated and going through the other city records, it was shown that none of the cars so treated could have gone aboard the GRELMARION (R. 630-634 and 640-641). An expert witness, on being given the nature of the symptoms testified to by Petitioners, testified that the harmful fumigant causing the incident here could not have

been high-life (R. 878-880) and in addition, testified that weevilcide which in part contains the same ingredients as high-life would not be dangerous even in a bin provided 24 hours elapsed after fumigation (R. 871-872). As previously shown, if high-life was applied in the railroad car, the car was withheld from unloading at least 48 hours. There is no evidence that high-life or any fumigant applied to railroad cars caused the incident involved. Additionally, Galveston Board of Trade inspectors would inspect the car after high-life had been applied before granting a certificate to unload it. (R. 626 and 805).

THE TRIAL COURT CORRECTLY FOUND THAT THE GRAIN WAS NOT FUMIGATED WHILE IN ELEVATOR B.

The Trial Court found that from the books and records of the City, from the effects which the fumes had had upon the Libellants and the symptoms manifest by them, the fumes causing the incident were from chloropicrin, an insecticide which had never been used by the City and which in all probability was applied at some inland elevator before the grain was transported to Galveston (Finding No. 12). The Court further found that it is the practice of the City to keep careful records of each bin so fumigated and to leave the contents undisturbed for a period of at least 72 hours (Finding No. 6, R. 84). These findings apparently are not attacked here and are correct. The City's Wharves General Manager, its Superintendent, General Foreman and Foreman each testified to the accuracy of the Wharves' books and records

(R. 676, 643, 659, 1035, 1052-1054). No doubt was cast upon the credibility, honesty, integrity or truthfulness of these witnesses. The essence of the testimony of each of them, with the exception of the General Manager, who was not present and who did not have immediate custody of the records, was to the effect that a fumigant record (Exhibit BB) was kept which accurately and completely showed each and every time any grain in the elevator was fumigated (R. 659-665, 1050-1054 and 1032-1036). City Exhibit BB, the fumigation record book, shows that some hard winter wheat in Bin A-261 was fumigated on December 3, 1956. The next wheat fumigated was in Bin 62 on January 27, 1957 and again on February 4, 1957. From December 3, 1956 down to the date loading commenced on the GRELMARION, these two bins were the only bins of wheat fumigated and were necessarily the only wheat of any kind fumigated in the elevator. The fumigant so used in these bins was weevilcide (R. 660). The undisputed testimony is that after 24 hours, it is safe to load grain which has been fumigated with weevilcide and from the last date of these fumigations, i. e., February 4, 1957 to the date of the incident, March 14, 1957, there was no possibility of weevilcide hurting or injuring anyone (R. 870-74).

In addition, the fumigation record shows that Bin C-225 was fumigated on March 12, 1957. However, this bin could not have been used because (1st) it is not shown on the line of the bins to be used (Exhibits F through W exclusive of Exhibits H. Q and R) and (2nd) 72 hours after fumigation is always required before any fumigating grain is put aboard a vessel

(R. 1047-1049). The net effect of the undisputed testimony is that by comparing the line-up or records of grain used to load the ship (City's Exhibits F through Z exclusive of Exhibits H, Q and R) and examining the fumigation records (City Exhibit BB) no grain fumigated in the elevator went aboard the ship (R. 642-665, 1032-1036, 1051-1054). Further, all Petitioners testified that they first felt a tearing of their eyes as distinguished from smelling anything and that they had throat constriction and certain chest pains. The evidence is undisputed that weevilcide, the fumigant used in the elevator, would not cause this tearing of the eyes (R. 862) and would not cause a throat or chest constriction (R. 873).

The above is only a portion of the testimony on this point but we believe is sufficient to demonstrate the correctness of the Trial Court's finding. Petitioners' only attack upon all this testimony is that fumigated grain sometimes might be transferred from one bin to another. (Petitioners' Brief, Pg. 26). The answers to this contention are numerous: (1st) as shown by City Exhibit BB, Pg. 35, even assuming that grain had been transferred from one bin to another, nevertheless, the only wheat which had been fumigated in the elevator since December 3, 1956 was one bin on December 3, 1956, another bin on January 27, 1957 and again on February 4, 1957, and all effects of any such fumigation would have been dissipated long prior to March 14 (R. 874); (2nd) the uniform practice of the Wharves was not to move any grain which had been fumigated until the expiration of 72 hours which is the safe tolerance for any exposure (R. 1047-1049).

In Petitioners' argument under this point, they make references to certain other incidents alleged to be similar. Whatever may have been the evidence in each such incident, the fact of litigation and/or settlements could not be used here to prove a fact of fumigation which is a fact to be tried in this lawsuit under the evidence introduced here.

THE TRIAL COURT'S FINDING THAT THE CITY DID NOT KNOW AND IN THE EXERCISE OF REASONABLE CARE SHOULD NOT HAVE KNOWN THAT THE GRAIN HAD BEEN IMPROPERLY TREATED WITH AN EXCESSIVE AMOUNT OF FUMIGANTS IN AN INLAND ELEVATOR IS PROPER (FINDING NOS. 7, 8, 12, 14, 15 and 16, Tr. Pgs. 84-89).

We have shown that the grain was not fumigated while in Galveston either in the yards or in the elevator. At times grain is treated at inland elevators prior to being shipped to Galveston. (R. 676). The Trial Court found that a fumigant by the name of chloropicrin was put upon the grain at some inland elevator. (Finding No. 12). The Court further found that the normal and customary application of chloropicrin at inland point would not be harmful under the circumstances here unless an unduly large quantity had been improperly applied; that the City did not know and in the exercise of reasonable care could not have known that the fumigant had been improperly

applied at some inland point and had never received knowledge of any prior instance where chloropicrin or other fumigants applied at inland elevators had adhered to the grain long enough to present a danger after receipt at the elevator and that the City was not negligent in failing to know or learn of the presence of this quantity of chloropicrin in view of all examinations and inspections made of the grain. (Findings Nos. 14, 15 and 16). The Petitioners do not attack these findings here. The testimony is to the effect that considering the symptoms and testified to by Petitioners, the harmful fumigant here was chloropicrin. (R. 879-880 and 895). It is undisputed that chloropicrin properly applied at an inland elevator or elsewhere, would represent no hazard to later handlers of grain (R. 919-920) but it is the misuse of the product which causes the trouble. (R. 922).

The undisputed evidence shows that the Galveston Wharves Elevator B has been in operation for many years. Millions upon millions of bushels of wheat have been shipped from inland points to the elevator and through the elevator for export without any inland fumigation causing any trouble (R. 597, testimony of witness Carroll of an average of approximately 38 million bushels a calendar year for each of the last five years —R. 712; testimony of Sandberg that from the time that he took over in May, 1954 until the GRELMARION incident, there have been no unusual occurrences—R. 576). The elevator follows the same procedures as are followed by all other export elevators (R. 671) and there is no evidence of this result ever happening before anywhere.

We pause here to remark that Appellants apparently rely upon the LIPSCOMB LYKES incident in 1949, the PANAMOLGA incident in 1950, and the ZOSIANNE incident in 1953. However, as shown by Finding No. 17, each of these cases involved a finding or claim that the City itself had fumigated the grain and was, therefore, liable. None of the claims involved a finding or claim by the Plaintiff that the fumigant had been improperly applied at an inland elevator.

Under these circumstances, the facts are clear that as in the case of all elevators, the City as operator of Elevator B knew that wheat on occasion was fumigated inland; it also knew that millions upon millions of bushels of wheat had gone through Elevator B without any incident involving inland fumigation; it knew that millions upon millions of bushels of wheat had gone through other export elevators without incident; it knew that if fumigants were properly applied inland, the effects would be dissipated before arrival in Galveston and it had a right to presume that anyone fumigating grain at inland points would do it properly and further that anyone shipping wheat that had been fumigated in such a manner as to make it harmful to humans would notify the elevator.

EVEN ASSUMING THAT, CONTRARY TO FACT, THE CITY HAD NOTICE THAT CHLOROPICRIN MIGHT AT TIMES HAVE BEEN IMPROPERLY APPLIED AT INLAND ELEVATORS AND ASSUMING THAT SOME DUTY EXISTED TO IN-

SPECT THE GRAIN TO DETERMINE WHETHER IT HAD BEEN FUMIGATED INLAND, THIS DUTY HAS BEEN COMPLIED WITH IN A REASONABLE MANNER.

The Trial Court found that the grain had been inspected in a reasonable manner. (Finding Nos. 7, 8, 15 and 16). This finding is correct. When the railroad cars first arrived in the Galveston yards, the Galveston Cotton Exchange Board of Trade samplers would break the seal on each car and go in and take samples from some five different places in the car (R. 596-597, 801); samples were then taken to the Galveston Cotton Exchange's laboratories where inspectors employed there perform the neeessary tests to establish the quality of the grain . (R. 597). These inspectors are licensed by the Department of Agriculture and supervised by them. (R. 668, 798). While these inspectors and samplers are primarily interested in the grade of the grain, odors are a part of the grade, and these inspectors are interested in and inspect for foreign odors. (R. 675). When taking the samples, if the sampler encounters any odors in the car, he will note this fact on the pan ticket covering that particular car and when the grain comes to the laboratory, the inspector will make the final decision as to odors (R. 802). After samples are taken and the grain, among other things, tested for odor, if the odor is sufficient, a notation will be placed of "commercially objectionable foreign odors". (R. 804). The odor test is made by the inspectors sense of smell. (R. 805). If the car is found weevilly and is fumigated in the

yards, a subsequent inspection will be made by Board of Trade people some 48 to 72 hours later. (R. 805). Throughout the entire operation in the elevator, all elevator personnel are also on the alert for any foreign odors. When the car is unloaded over the unloading pits, two Galveston Wharves employees work in the car using mechanical shovels and sweeping it out for approximately one hour (R. 601). The grain is thoroughly aerated on moving through the elevator. When the grain is redelivered from the bins enroute to ships, the men running the grain belt, which is receiving the grain from the various storage bins, have the duty of watching and examining the grain, including a continuous odor test by ordinary smelling processes. (R. 676-677).

As the grain is delivered into the hold of the ship, a sampler of the Galveston Cotton Exchange & Board of Trade takes samples at regular intervals (R. 810) and a part of both the samplers and inspectors duty is to detect odors in the grain (R. 811-812). These inspectors are supervised by the Department of Agriculture men in many instances. (R. 812). The Galveston Board of Trade samplers and inspectors inspected the grain that went aboard the SS GRELMARION. (R. 813). The chief inspector identified the log of the GRELMARION (Exhibit DD) and stated by reason of absence of any notations of odors, it would appear that according to his inspectors, no odors were indicated on the grain loaded aboard the GRELMARION. (R. 821-822). Similarly, the testimony of Carl W. Boozer, Commercial Grain Inspector for the Galveston Cotton Exchange was to

the effect that he was aboard the GRELMARION during the loading of that vessel and that no unusual odors were noted. (R. 940-943). He also testified that there was a United States Department of Agriculture Grain Inspector present. (R. 944-945). The method of inspection is shown through the testimony of Mr. Boozer. The same is true of sampler Fred H. Walker, the Galveston Cotton Exchange & Board of Trade employee, who testified that there were no unusual odors noted while loading the GRELMARION. (R. 994-996). The same is true of the testimony of Billy Ray Goss, a grain sampler, for the same organization, who worked the GRELMARION and smelled nothing unusual as a part of his sampling or inspection duty. (R. 1017-1027). J. P. Smelley, inspector for the United States Department of Agriculture testified that his inspectors worked the GRELMARION and nothing unusual happened relative to any fumigant odors. (R. 1010). The witness Siegfried Freeman, a grain supervisor for the United States Department of Agriculture testified that his organization tested grain for, among other things, odors (R. 959); that he supervised the loading of the GRELMARION (R. 960); that the sampler had instructions if they caught a foreign odor to immediately cut the ship off (R. 961) and that nothing happened aboard the GRELMARION of unusual nature according to his records (R. 962). It is submitted that the above testimony clearly shows that the grain was at all times adequately and reasonably inspected.

Appellant sapparently complain that no chemical tests were made. However, it is shown that this is

not done anywhere in the industry (R. 671) and this would be contrary to the custom of the trade. Also such a proposed test would be impractical and as a matter of fact, it would be practically impossible to detect chloropicrin clinging on a very few bushels of grain. In this connection, it must be remembered that under the undisputed testimony, if chloropicrin is properly applied at an inland elevator, it will cause no damage but the only way that it could cause any possible damage is by an improper application of a large dose to a small amount of grain and it would be by the merest chance, even if a chemical inspection were made, that such a small amount of grain would be contained or caught in the samples tested unless, it is going to be required that practically each bushel be separately tested before loading. This is obviously beyond the realities of the situation.

Petitioners at Pages 28-29 of their Brief quote certain testimony wherein the Court inquired as to the reason one of the inspectors did not take a sample immediately **after the incident in question.** We can scarcely see the purpose of quotation of this testimony. The taking of a sample at such time would not have forestalled or prevented the incident. In this connection, the testimony is undisputed that the reason that the Galveston Wharves did not test a sample of the grain after the alleged incident, was that according to the Wharves records, which were checked at that time no fumigated grain had been put aboard the GRELMARION (R. 592 and R. 1036).

THE TRIAL COURT CORRECTLY FOUND THAT ANY ADDITIONAL INSPECTIONS WOULD HAVE BEEN UNAVAILING.

The Trial Court found "I find that had additional inspections been made by the Respondent City, there is no reason to believe that such inspections would have been more successful". (Finding No 16).

As shown by the above statement, many and continuous inspections were made. Chloropicrin, if properly applied in an inland elevator, would cause no damage. It is only when a large amount of chloropicrin is poured upon a very small amount of grain that any possibility of fumes arise. Considering the millions upon millions of bushels of wheat that go through the elevator, unless each and every bushel is going to be separately and chemically tested (which is obviously beyond the practical realities of the situation), further inspection would not have in reasonable expectation been of any help or more successful.

All of the above argument demonstrates the correctness of the Trial Court's findings of fact that the City did not fumigate the grain, that it had no reason to expect or believe that improper fumigation had occurred in any inland elevator, that it was not negligent in failing to discover an excessive and improper dose of chloropicrin on a very few bushels of wheat, that it reasonably inspected the grain that came to the elevator and that additional inspections would have been unavailing and that as a matter of fact, the City was guilty of no act of negligence. Additionally, we

respectfully submit that under the doctrine of the **McAllister** case, the findings of fact made by the Trial Court and approved by the Court of Appeals were proper and justified and in no event, can be considered clearly erroneous.

The Trial Court was correct as a matter of law. The grain handled bp the elevator is received from inland carriers and held in transit for export aboard water carriers. The City is not the owner of the grain, the Louis Dreyfus Corporation being the owner (R. 1133). Through many years of operation, many millions of bushels of wheat have been exported through Galveston and other ports of the United States and so far as is known, this is the first time that improper inland fumigation may have caused an injury. The City had no notice of any such condition and in the absence of specific notice, was entitled to presume that the grain reaching it was in proper condition.

The rule is well settled that any handler of a commodity in commerce whether it be bailee, warehouseman, carrier or otherwise has the right to presume, in the absence of information putting him on notice to the contrary, that the commodity tendered to him is in good condition and safe for handling. This rule was first established in **Parrott vs. Barney,** 1 Sawyer 423, 18 Fed. Cases Pg. 1236, Federal Case No. 10773 (Cir. Ct. Calif.) wherein, in a case involving nitroglycerine, Mr. Justice Sawyer held that a person handling goods in the regular course of business had the right to presume that they were not dangerous unless suspicious circumstances were shown.

Mr. Justice Sawyer further held in that case that there was nothing to put the carrier on notice of the hazard and that the carrier was not guilty of negligence. The case then came to this Court and is reported as **"The Nitroglycerine Case"**, 15 Wallace 524, 82 U.S. 524, 21 L.Ed. 206. This Court in an opinion by Mr. Justice Field held that carriers had a right to presume that the goods offered were in good condition and not dangerous and that, until notice to the contrary was received, had a right to rely upon such facts. This Court further held that no liability existed on the carrier in that case.

The uniform holdings since the Nitroglycerine Case have been in accord with this rule. See **Mainwaring vs. Bark Carrier Delap, etc.,** 1 Fed. 874 (D. C. New York), and **Craine vs. Oliver Chilled Plow Works,** 280 Fed. 954 (CCA 9th). While the above cases relate primarily to carriers, nevertheless, this same principle is true as to other handlers of goods in the channels of commerce. In the absence of notice, the City is entitled to presume that the wheat shipped to it is not injurious to humans and is further entitled to presume that its own handling of the cargo by the accepted and universally practiced method of handling will not be injurious to humans. Over a period of many years, millions of bushels had gone through Elevator B. Fumigants applied inland had never before caused any difficulties. The uniformed practice of the industry was followed. No facts were known which would put the City upon inquiry. Under these circumstances and under the above authorities, the City was not negligent.

SECOND COUNTER PROPOSITION

THE TRIAL COURT'S FINDINGS OF THE AMOUNT OF DAMAGES SUSTAINED BY EACH OF THE PETITIONERS WAS ADEQUATE.

STATEMENT AND ARGUMENT

Petitioners' Proposition No. 5 is that the Trial Court's award of damages was clearly erroneous and inadequate. So far as we can find, Petitioners make no record references to support their argument.

In order to determine the adequacy of the finding as to damages, it is necessary to consider the testimony of each Petitioner and the testimony of four doctors and certain exhibit testimony as to earnings. The testimony of the various Appellants is found at the following pages in the record: Morales, 23-118; Majia, 118-183; Arrendondo, 183-219; DeLeon, 399-428; Balli, 429-443; Serrato, 444-458; A. Ovalle, 458-469; and J. Ovalle, 516-543.

The medical testimony is found: Dr. Adriance, R. 469-514; Dr. Jinkins, R. 328-359; Dr. Futch, R. 1066-1119; and Dr. Mendell, R. 725-794.

Petitioners have made no effort in any way to review this testimony. Their whole argument is apparently based upon two thoughts: (1st) They assert that the amount of compensation plus medical paid by the employer's insurance carrier is approximately one-half to 70% of the total amount of the damages allow-

ed by the Court; and (2nd) that there was a drop in the overall earnings of each Petitioner when comparing the year 1956 (prior to the accident) and the year 1957, the year of the accident. Based upon these two ideas alone, Petitioners seek to overturn the fact finding of the Trial Court as to damages.

As to the first basis of Petitioners, i. e., their contention that the amount of compensation paid by the insurance carrier plus medical runs about one-half to 70% of the total award, the amount of compensation paid and the period for which paid, of course, are not admissible in this case. The amounts were paid voluntarily by Petitioners' employer's compensation carrier. Whether they were paid because the insurance company thought the amounts reasonable or to avoid the expenses of litigation or whether they were paid for some other reason is not material here because the amount so paid is not admissible in this case. We have had no right to cross-examine as to the reasons, facts or basis of such payments. We were not parties to such payments and did not consent to them. Under no circumstances can the voluntary payments made by way of compensation be used as evidence of damages in a third party action—see **Meyers vs. Thomas**, 186 S. W. (2d) 811 (Tex. Sup.) and **Johnson vs. Willoughby**, 183 S. W. (2d) 201 (Tex. Civ. App.—error refused).

The second argument, i. e., a decline in earnings during the year of the accident as compared to the previous year, equally affords no basis for Petitioners' contention. Each of Petitioners belongs to the Banana

Local, which is independent from the longshoremen (R. 57). Insofar as longshore work other than bananas is concerned, they therefore take only what is left as far as work in concerned. The reduction in earnings in 1957 under the state of this record proves nothing in that the real reason for loss of income to Petitioners during the year 1957 is explained by the record. First taking the banana longshoremen earnings for the years 1956 and 1957, we find no decrease in earnings and in fact, an overall increase. As shown by Petitioners' Exhibit 10, Petitioners income from longshoring bananas for the years 1956 and 1957 are as follows:

NAME	Banana Longshoring Income 1956	Banana Longshoring Income 1957
Jesse Ovalle	$ 1,784.37	$ 1,749.54
Fidencia Balli	$ 1,762.25	$ 2,143.64
Juan Arrendondo	$ 1,992.10	$ 2,058.37
Miguel Mejia	$ 1,131.03	$ 1,154.06
Robert Morales	$ 1,767.89	$ 1,808.90
Nick DeLeon	$ 1,840.70	$ 1,805.83
Apolonia R. Ovalle	$ 1,725.04	$ 1,790.26
Michael Serrato	$ 231.44	$ 1,436.77
	$12,234.82	$13,947.37

The other substantial source of Petitioners income during the year 1956 was grain longshoring. As shown by City's Exhibit GG, the Galveston Wharves loaded forty-four and one-half million of bushels aboard 191 ships during the year 1956. In 1957, the

Wharves loaded thirty-two and one-half million of bushels aboard 147 ships (R. 977). In other words, the loss in grain longshoring work was due to a decline in shipments.

The testimony sustains the findings of the Court.

Dr. Carroll Adriance testified that he treated the Petitioners, Morales, Arrendondo, DeLeon, Mejia, Serrato, A. Ovalle, J. Ovalle and Balli; that he did not believe that any of the Petitioners suffered liver damage (R. 497-498); and that he thought that all of them had recovered at the end of a two or three months period (R. 499-500).

Also, a brief analysis of the additional testimony as to each claimant will demonstrate the correctness of the Court's findings. The Petitioners are discussed here in the order as listed on their Exhibit #10 in the Trial Court:

1. Jesse Ovalle. On trial, this witness claimed a partial disability of from 7 to 10 weeks but during that time worked on banana boats and grain boats (R. 526-527); he did not remember how long after the incident it was that he worked his first grain boat in this 7 to 10 weeks but during that time worked on banana boats and grain boats (R. 526-527); he admitted that after three months he worked regular (R. 528); he worked a banana boat on March 16th, two days after the accident; and another banana boat on March 18th (R. 529-530). At the time of the trial, he was working every kind of boat (R. 532). Dr.

Futch testified that his liver function tests were all within normal limits (R. 1082); that he last saw Mr. Ovalle on June 11, 1957 (R. 1081); that he did not find him suffering from any condition attributable to the incident of March 14, 1957 but on the other hand did find a spinal condition of abnormality which would be consistent with the complaints he was then having (R. 1082-1083).

2. Fidencia Balli. This Petitioner only claimed to have been off 14 days (R. 436). However, he worked a banana boat on March 16th, 2 days after the accident (R. 439) and subsequently worked other banana boats (R. 339-440). During this 14 days, he earned $116.74 working banana boats (Ex. KK).

3. Juan Arrendondo. This Petitioner claims to have been off work for 8 weeks (R. 194). However, he worked a grain boat within 2 days after the accident (R. 198) and continued to work them regular (R. 212).

4. Miguel Mejia. This Petitioner claimed to have laid off about 3 months (R. 137). However, he worked a banana boat a day or two after March 14, 1957 (R. 150). According to Dr. Futch, who examined this Petitioner between May 27th and June 3, 1957 (R. 1073), at the time of such examination, he found no residue of any damage alleged to have been caused by the incident of March 14 (R. 1073-1074) but he did find a functional digestive disorder (R. 1074).

5. A. R. Ovalle. The testimony with respect to this Petitioner is a little confusing. He first testified that "maybe so" he lost 4 months but when asked if he did not work during these four months, he stated "yes" and that he worked grain and flour; that in April, 1957, he worked bananas and grain; that in May, he worked boats other than bananas (R. 464); and that during the latter part of March, 1957, he worked flour, grain and sulphur (R. 465). He admitted to working banana boats on March 16, 18, 22, 27 and thereafter regularly on banana boats as they came in (R. 476-467). He also admitted that after the incident of March 14th, he worked grain boats (R. 467); in answer to another question, he stated that the first time he worked a grain boat was in the last days of May, 1957 (R. 468) but he admitted of working one or two grain boats at the end of March, 1957 (R. 468). Dr. Futch testified that he saw this Petitioner on May 31, 1957; that he found no evidence of liver damage; that the liver function tests were normal (R. 1078-1079); that there was no residual damage (R. 1080-1081) but that he did find other conditions which would explain the patient's complaints, i. e., a mild cervical osteo-arthritis (R. 1081).

6. Michael Serrato. This Petitioner claimed to have been off 2 or 3 months from work. However, he commenced working banana boats regularly 4 days after the accident (R. 454); he worked banana boats regularly during April and May and admitted that during this time, the banana boats were the only boats that were in Galveston that he could work on then (R. 455); the witness also admitted that after the end

of this approximately two months period, he worked in grain (R. 451).

7. Robert Morales. This Petitioner admitted to working grain boats the first or second day after the accident (R. 69); he worked several banana boats during the rest of March (R. 70) and he admitted to working regularly after November, 1957 (R. 114). Dr. Futch testified that on May 27, 1957 at the time of his examination, there was no evidence of liver damage (R. 1057) but that he did find thyroid trouble (R. 1076) but that exposure to a toxic gas would not affect a thyroid (R. 1077) and that there was no connection between fumigants and thyroid. Dr. Futch further testified that he did not find any evidence of residual damage that could have been caused by the episode of March 14, 1957 (R. 1077).

8. Nick DeLeon. This Petitioner testified that for about 8 months, he had very little work (R. 416) but again admitted that he worked a grain boat 3 or 4 days after March 14 (R. 420); that he worked 3 or 4 ships of grain during the eight month period and has worked them regularly since (R. 421). He also admitted to working a banana boat 2 days after the accident, another one 4 days after that, and continuously from that time (R. 422). Dr. Futch testified that he saw Mr. DeLeon about June 3, 1957; that he found no residual damage to the liver (R. 1084) but he did find a condition which would have accounted for the symptoms being complained of, i. e., high blood pressure (R. 1085).

In addition to the above, Dr. Futch testified with respect to each one of the Petitioners examined by him. He found no evidence of residual damage (R. 1087); he did not attribute any of their complaints at the time of his examination to the incident of March 14 (R. 1110).

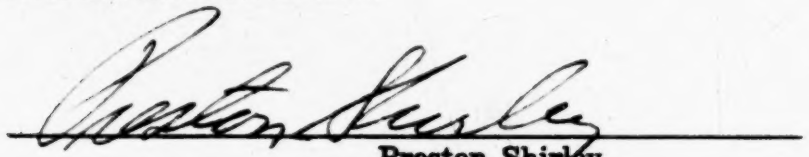
The above does not purport to be a complete resume of all testimony in the record on the issue of damage. It is reviewed here only to show that there was more than ample evidence to sustain and in fact require the Trial Court's findings. It is submitted that the evidence amply demonstrates that there is no basis for Petitioners' contention that the findings of fact as to damages are inadequate and clearly erroneous.

CONCLUSION

In conclusion, we respectfully state to the Court that the findings of the Trial Court, approved by the Court of Appeals, are amply sustained by the evidence and in any event cannot be considered as clearly erroneous. Independent of any question of how this Court may determine the applicability of the doctrine of unseaworthiness in the controversy between Petitioners and the Respondent, Cardigan Steamship Company, Ltd., we respectfully state that as to us, the judgment of the Trial Court should be in all things affirmed and we so pray.

Respectfully submitted,

McLEOD, MILLS, SHIRLEY & ALEXANDER
PRESTON SHIRLEY



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